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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

AFROUZ NIKMANESH, ELVIS ATENCIO, ANNA NGUYEN, AND EFFIE SPENTZOS, on behalf of themselves, the general public, and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC., a Delaware corporation, and WAL-MART ASSOCIATES, INC., a Delaware corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. 8:15-cv-00202 AG-JCG

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE RULE 23; MEMORANDUM OF POINTS AND AUTHORITIES

(Declarations of Eric M. Epstein, Esq., Afrouz Nikmanesh, Anna Nguyen, Effie Spentzos, Elvis Atencio, Malcolm S. Cohen, PH.D., Compendium of Class Member Declarations, and Proposed Order filed concurrently herewith)

Judge: Andrew J. Guilford
Date: August 8, 2016
Time: 10:00 a.m.
Courtroom: 10D

PLEASE TAKE NOTICE that on August 8, 2016, at 10:00 a.m. in the above-entitled Court, Plaintiffs, AFROUZ NIKMANESH, ELVIS ATENCIO, ANNA NGUYEN, AND EFFIE SPENTZOS (collectively "Plaintiffs") through their attorneys, will move the Court, pursuant to Federal Rules of Civil Procedure, Rule 23, for class certification as follows:

1. Certification of the following classes:

    a. All current and former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who took the Wal-Mart sponsored APhA Immunization Certification Training Course (the "Training Course") during their employment, within four years of the filing of the original complaint until the date of judgment, and who were not paid any wages for the home study and test portions of the Training Course (the "Training Course Class").

    b. All current and former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who did not take a 10-minute rest break during the first 4 hours of their shift, or a second 10-minute rest break for all shifts of 6-10 hours, when they were scheduled to be the only Pharmacist on duty at any time during their shift, within four years before the filing of the original complaint until the date of judgment (the "Rest Break Class").

    c. All current and former non-exempt employees, employed by Defendants as Pharmacists within the State of California, who are members of the Training Course Class and/or the Rest Break Class, and as a result of the claims alleged herein, were not provided with accurate, itemized wage statements as required by California Labor Code §226, within one year before the filing of the original Complaint until the date of judgment ("Wage Statement Class").

    d. All former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who are members of either the Training Course Class and/or the Rest Break Class, and as a result of the claims alleged herein, were not paid all wages due and owing at the time of their separation as required by California

Labor Code §§201-203, within three years from the filing of the original Complaint until the date of judgment ("Waiting Time Class").

e. Plaintiffs also seek to certify a class under California's Unfair Competition Law (Bus. & Prof. Code §§17200, et seq.).

2. Appoint Plaintiffs Afrouz Nikmanesh, Anna Nguyen, Effie Spentzos and Elvis Atencio as Class Representatives;
3. Appoint Eric M. Epstein of Eric M. Epstein, APC, Mark R. Thierman and Joshua D. Buck of Thierman Buck, LLP and Dayton B. Parcells, III of Parcells Law Firm Class Counsel; and
4. That Notice be sent to certified class members advising them of this action.

Plaintiffs' motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities in Support Thereof, and the Declarations of Class Representatives Afrouz Nikmanesh, Anna Nguyen, Effie Spentzos, and Elvis Atencio, the Declaration of Malcolm S. Cohen, PH.D., the Declaration of Eric M. Epstein, Esq., and the Compendium of Class Member Declarations, filed concurrently herewith, and all accompanying exhibits, pleadings, papers, and records on file herein, all matters upon which judicial notice may be taken, any oral argument that may be presented, and upon such other matters the Court deems just and proper.

Dated: June 1, 2016

THIERMAN BUCK LLP
PARCELLS LAW FIRM
ERIC M. EPSTEIN, APC

By: */s/ Eric M. Epstein*
Eric M. Epstein
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This is a wage and hour class action suit brought on behalf of current and former nonexempt Pharmacist employees of Wal-Mart who worked in California during the relevant Statute of Limitations period.[1] The proposed classes to be certified pursuant to Federal Rule of Civil Procedure 23(a) are defined as follows:

a. All current and former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who took the Wal-Mart sponsored APhA Immunization Certification Training Course (the "Training Course") during their employment, within four years of the filing of the original complaint until the date of judgment, and who were not paid any wages for the home study and test portions of the Training Course (the "Training Course Class").

b. All current and former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who did not take a 10-minute rest break during the first 4 hours of their shift, or a second 10-minute rest break for all shifts of 6-10 hours, when they were scheduled to be the only Pharmacist on duty at any time during their shift, within four years before the filing of the original complaint until the date of judgment (the "Rest Break Class").

c. All current and former non-exempt employees, employed by Defendants as Pharmacists within the State of California, who are members of the Training Course Class and/or the Rest Break Class, and as a result of the claims alleged herein, were not provided with accurate, itemized wage statements as required by California Labor Code §226, within one year before the filing of the original Complaint until the date of judgment. ("Wage Statement Class").

d. All former non-exempt employees, employed by Defendants as Pharmacists in the State of California, who are members of either the Training Course Class and/or the Rest Break Class, and as a result of the claims alleged herein, were not paid all wages due and

[1] On August 18, 2015 the Court conditionally certified a class pursuant to 29 U.S.C. §216(b). (Doc. #71).

owing at the time of their separation as required by California Labor Code §§201-203, within three years from the filing of the original Complaint until the date of judgment ("Waiting Time Class").

Plaintiffs also seek to certify a class under California's Unfair Competition Law (Bus. & Prof. Code §§17200, et seq.). The UCL permits violations of other laws to serve as *per se* violations of the UCL. *McKell v. Washington Mut. Inc.*, 142 Cal. App. 4th, 1457 at 1474-75; *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 155 (2010).The UCL Class, Waiting Time Class and Wage Statement Class are derivative of the claims of the Training Course Class and Rest Break Class. As such, they should be certified for the same reasons set forth herein. *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 513 (C.D.Cal., June 27, 2011); *Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 547 (E.D.Cal., Feb. 21, 2014).

All Classes are comprised of non-exempt Pharmacist employees who worked for Wal-Mart in its California stores during the relevant period.[2] Plaintiffs and the Putative Class Member Declarations represent Pharmacists who worked in approximately 88 of the 310 Wal-Mart stores in California.[3]

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[2] Declaration of Class Representative Afrouz Nikmanesh ("Nikmanesh Dec."), ¶4; Declaration of Class Representative Anna Nguyen ("Anna Nguyen Dec."), ¶4; Declaration of Class Representative Effie Spentzos ("Spentzos Dec."), ¶3; Declaration of Class Representative Elvis Atencio Dec., ("Atencio Dec."), Plaintiffs' Compendium of Class Member Declarations which consists of 6 separate volumes containing the class member Declarations (the "Compendium"), ¶6; Jay Astor, ("Astor Dec.") ¶2; Frank Braverman ("Braverman Dec."), ¶3; Hui Cheng ("H. Cheng Dec."), ¶2; Karen Barach ("Barach Dec."), ¶5; James Beasley ("Beasley Dec."), ¶3; Jason Berg ("Berg Dec."), ¶3; John Carlson ("Carlson Dec."), ¶3; Jerome Chan ("Chan Dec."), ¶3; Nicole Chappell ("Chappell Dec."), ¶3; Dana Chau ("D. Chau Dec."), ¶3; John Chau ("J. Chau Dec."), ¶3; Hui Cheng ("H. Cheng Dec."), ¶3; Noah Chung, ¶3; Michael Clark, ¶3; William Conde, ¶3; Michael Crawford, ¶3; Glenn Dabek, ¶3; Charles Daly, ¶3; John Dang, ¶3; Michael Denham, ¶4; Anyeve Dogloh, ¶3; Mark Doss, ¶3; Cindy Gerringer, ¶3; Iqbal Gill, ¶3; Jackelyn Hong, ¶3; Tommy Huynh ("Huynh Dec."), ¶3; Robert Jackson ("Jackson Dec."), ¶3; Navneet Kaur ("Kaur Dec."), ¶3; Joyce Kim ("J. Kim Dec."), ¶3; Sam Kim ("S. Kim Dec."), ¶3; Richie Thuan Le ("R. Le Dec."), ¶3; Vuong Q. Le ("V. Le Dec."), ¶3; Maya L.J. Leiva, ¶3; Angie Mar ("Mar Dec."), ¶3; Richard Marshall ("Marshall Dec."), ¶3; Jerry McCamman ("McCamman Dec."), ¶4; Donald McDonald, ¶3; Santo Milosevich ("Milosevich Dec."), ¶3; Elvira Nemenzo ("Nemenzo Dec."), ¶3; Anhthi Ngo ("Ngo Dec."), ¶3; Ahn Nguyen ("Ahn Nguyen Dec."), ¶3; ; Brian Nguyen ("B. Nguyen Dec."), ¶2; Khanh Nguyen ("K. Nguyen Dec."), ¶4; Phoung Khanh ("P. Khanh Dec."), ¶3; Tin Nguyen ("T. Nguyen Dec."), ¶3; Van Nguyen ("V. Nguyen Dec."), ¶3; Christopher Oza ("Oza Dec."), ¶3; Tammy Park ("Park Dec."), ¶3; Krisha Patel ("K. Patel"), ¶3; Julie Peroutka ("Peroutka Dec."), ¶3; Daisy Petcharamuk ("Petcharamuk Dec."), ¶3; Hieu Phan ("Phan Dec."), ¶3; Ashok Popat ("Popat Dec."), ¶3; Irene Quiroz ("Quiroz Dec."), ¶3; Nicholas Surh ("Surh Dec."), ¶3; Monica Trinh ("M. Trinh Dec."), ¶5; Jerry Tsai ("Tsai Dec."), ¶3; Christine Vu ("Vu Dec."), ¶3; Hetal Weeramantry ("Weeramantry Dec."), ¶3; Shaina Welikonich ("Welikonich Dec."), ¶3; Cindy Wong ("Wong Dec."), ¶3; Michelle Vu ("M. Vu Dec.), ¶3; Zhou Zhang ("Zhang Dec."), ¶3.

[3] Epstein Dec., ¶2 Ex : P001910-1912: Relevant excerpts from Wal-Mart's 2016 Annual Report.

Plaintiffs' Training Course claims are based on allegations that Wal-Mart required Plaintiffs and putative class members to attend and complete a Wal-Mart sponsored APhA Immunization Certification Training Course (the "Training Course") so that Wal-Mart could provide immunization services to its customers, keep up with the competition and increase its revenues and profits.[4] Wal-Mart made a company-wide business decision to not pay Plaintiffs and putative class members for time spent performing necessary work on the home study (sometimes referred to as the "self study") and test portions of the Training Course.[5] The Training Course was not voluntary, it was directly related to their job as Pharmacists, and Wal-Mart was required by law to pay for the entire Training Course, including the home study and test portions. Plaintiffs' allege Wal-Mart failed to pay Training Course Class Members minimum and overtime pay pursuant to California law.

Plaintiffs also allege that Wal-Mart's common policies and practices relating to pharmacy operations discouraged and prevented Plaintiffs and putative class members from taking mandated rest breaks. Wal-Mart has a common written rest break policy applicable to all California stores and pharmacies.[6] Wal-Mart scheduled Pharmacists to work weekends, as well as significant portions of their shifts during weekdays, as the only Pharmacist on duty.[7] When there was only a single Pharmacist on duty, the following company-wide policies of Wal-Mart prevented or discouraged the Pharmacist from taking a rest break:

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[4] Epstein Dec., , ¶3, Ex. 2: Deposition of Ami Bhatt ("Bhatt Depo."), 10:20-12:3, 169:24-170:4; ¶4, Ex. 3: Deposition of Craig Crawford ("Crawford Depo."), 7:13-18, 245:7-14; ¶5, Ex. 4: Deposition of Pamela Piotrowski ("Piotrowski Depo."), 17:15-20, 49:9-20, 105:11-24, 167:3-8; Compendium, ¶9.

[5] Epstein Dec., ¶3, Ex. 2: Bhatt Depo., 173:23-174:4; ¶5, Ex. 4: Piotrowski Depo., 92:20-93:23; ¶7, Ex. 6: Moore Depo., 167:24-168:5; ¶9, Ex. 8: Deposition of Scott Voight ("Voight Depo."), 191:20-192:9; ¶ Ex. 24 [filed under seal]; ¶ Ex. 36 Chung Depo. [filed under seal], 150:12-20.

[6] Plaintiffs' Second Amended Complaint ("SAC"), Ex. 9: Docket No. 25-1, pp. 42-44; Epstein Dec., ¶44, Ex. 42.

[7] The Rest Period Class only includes claims when there was only one Pharmacist on duty Even for some Pharmacies when Wal-Mart scheduled two Pharmacists during the week, each shift was for only 8 hours (in order to avoid paying overtime) and since the Pharmacy was open for 12 hours, there was a 3½-4 hour time period when there was only one Pharmacist on duty-Compendium, ¶17.

1. The Pharmacist was prohibited from leaving the Pharmacy unattended without first "securing" the Pharmacy.[8] Securing the pharmacy involved a series of mandated steps, which took an average of 10-15 minutes to complete, including, notifying customers in line that the Pharmacy would be closing, securing the drugs, re-locating the Will Call Bin to the inside of the prescription filling area, insuring that all other Pharmacy employees leave the Pharmacy, closing and locking all Pharmacy windows and doors, insuring the prescription filling area lights remain on, redirecting the phone to voicemail, and setting the alarm.[9] Re-opening the Pharmacy took approximately another 5-10 minutes.[10] A Pharmacist was discouraged from closing down the Pharmacy for 30 minutes to take a 10 minute break because it would impact customer service and adversely affect the Pharmacist's ability to meet other Wal-Mart metrics as set forth below. It should also be noted that prohibiting the Pharmacists from leaving the Pharmacy unattended without first "securing it", is **not** required by law, but is simply a Wal-Mart policy which is actually inconsistent with California law. (See Business & Professions Code, Sections 4115(g) and 4116(b)(2) which specifically permit a Pharmacist to leave the Pharmacy unattended for lunch and rest breaks **without** having to secure the Pharmacy. (For example, by leaving a pharmacy technician in charge.)

2. Wal-Mart required all Pharmacists to set the pharmacy alarm when they closed the pharmacy, thereby generating a data "trail" to ascertain if and when the pharmacy was closed.[11]

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[8] Epstein Dec., ¶35, Ex. 33 [filed under seal];¶38, Ex. 36 [filed under seal]: ¶8, Ex. 7: Deposition of Anthony Chung ("Chung Depo."), 91:2-8; ¶7, Ex. 6: Deposition of Warren Moore ("Moore Depo."), 101:7-14, 111:16-112:11. ¶24, Ex. 22 [filed under seal], Chung Depo., 87:9-88:14; ¶43, Ex. 41[filed under seal]: Deposition of Paresh Patel ("Patel Depo."), 58:21-59:24, 60:10-15, 68:23-70:22; Nikmanesh Dec., ¶5(a); Anna Nguyen Dec., ¶5(a); Spentzos Dec., ¶4(a); Atencio Dec., ¶7(A); Compendium, ¶14.

[9] Nikmanesh Dec., ¶5(a); Anna Nguyen Dec., ¶5(a); Sptentzos Dec., ¶4(a); Atencio Dec., ¶7(A); Compendium, ¶14; Compendium, ¶15., Epstein Dec., ¶35, Ex. 33, p.1, [filed under seal]

[10] . Nikmanesh Dec., ¶5(a); Anna Nguyen Dec., ¶5(a); Spentzos Dec., ¶4(a); Atencio Dec., ¶7(A); Compendium, ¶15.

[11] Epstein Dec., ¶31, Ex. 29 [under seal]; ¶35, Ex. 33: [under seal], ¶43, Ex. 41: Patel Depo. [under seal], 67:3-18.

3. Pharmacists were discouraged from closing down the pharmacy for rest breaks.[12] However, a Pharmacist could not take an uninterrupted rest break inside the Pharmacy because pursuant to Wal-Mart policy the Pharmacist is responsible for preventing drug diversion and controlling access to the Pharmacy.[13] Therefore, the Pharmacist is "on duty" if he or she is inside the Pharmacy taking a "break" because he/she must still monitor the Pharmacy and employees to prevent drug diversion and control unauthorized access to the Pharmacy.[14] This is the same "on duty" rest break issue now pending before the California Supreme Court in *Augustus v. ABM Security Services, Inc.*, 233 Cal.App.4th 1065 (Dec. 31, 2015), *review granted*, April 29, 2015.

4. Wal-Mart evaluated the performance of Pharmacists, in part, based on their ability to fill in-store prescriptions within 20 minutes of receipt and receive high marks on customer survey responses.[15] Taking a rest break would jeopardize this metric.

The combination of the above common policies and practices resulted in a failure to make available one if not more mandated rest breaks during the Pharmacists' shifts because they worked in concert to discourage and/or prevent the Pharmacists from taking rest breaks.

II. The Training Course Was Sponsored by Wal-Mart So Its Pharmacists Could Administer Immunizations

In order to compete with other chain pharmacies such as CVS and Walgreens and to increase revenues and profits, Wal-Mart decided it wanted to expand the services offered by its in-store pharmacies to provide immunization shots to its customers.[16] In 2013, Wal-Mart rolled out the campaign to ensure Pharmacists became immunization certified with the goal that all stores would provide immunization services by September 2014.[17] Only a Pharmacist can a administer immunizations.[18] Pharmacists must be certified in order to be able to lawfully provide immunizations.[19] In order to be certified they must first attend and complete an approved certification course.[20] Wal-Mart arranged for current Pharmacist employees to attend the APhA Immunization Certification Training Course ("Training Course") which was the only one approved by Wal-Mart for Pharmacists to attend.[21] In order to successfully complete the Training Course and become certified, the Pharmacists were required to complete a self study and test portion (hereinafter the "Home Study" portion) prior to attending the classroom portion of the Training Course.[22] Based on the Declarations of the Plaintiffs and Training Course Class Members, it took them an average of approximately 12 hours to complete the Home Study portion of the Training Course.[23] Pharmacists were not provided time to complete the Home Study portion of the Training Course during their regular work hours thereby requiring Plaintiffs and Training Course Class Members to complete this necessary component of the

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[12] Epstein Dec., ¶4, Ex. 3: Crawford Depo., 128:9-21-; ¶10, Ex. 9; ¶11, Ex. 10; ¶12, Ex. 11; ¶ Ex. 36 [filed under seal]: Chung Depo., 16:11-25, 117:11-118:23; Spentzos Dec., ¶4(f); Compendium, Barach Dec., ¶14; Hong Dec., 8; R. Le Dec., ¶4(a); Milosevich Dec., ¶9.

[13] Nikmanesh Dec., ¶5(f); Anna Nguyen Dec., ¶5(g); Spentzos Dec., ¶4(g); Atencio Dec., ¶7(G); Epstein Dec., ¶6, Ex. 5: Patel Depo., 33:22-35:9; ¶32, Ex. 30 [filed under seal; ¶ Ex. 41[filed under seal]: Patel Depo., 61:19-63:25.

[14] Epstein Dec., ¶7, Ex. 6: Moore Depo., 111:16-112:11 [Pharmacist must be in line of sight of the pharmacy]; ¶9, Ex. 8: Voight Depo., 31:11-22; ¶, Ex. 29 [under seal]; ¶35, Ex. 33 [under seal]; ¶42, Ex. 40 [under seal]: Patel Depo., 67:19-68:22.

[15] Epstein Dec., ¶37, Ex. 35 [Under Seal] ¶39, Ex. 37 [Under Seal]; ¶41, Ex. 39 [Under Seal]; ¶6, Ex. 5: Patel Depo., 36:18-36:24; ; Nikmanesh Dec., ¶5(b); Anna Nguyen Dec., ¶5(d); Spentzos Dec., 31:19-31:18; ¶¶4(b), 4(c)(i); Atencio Dec., ¶7(C); Compendium, ¶16. Crawford Depo, 86:23-87:4; Bhatt Depo 31:9-31:18; Piotrowski Depo, 38:8-39:21, 47:2-48:19.

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[16] Epstein Dec., ¶3, Ex. :2 Bhatt Depo., 169:24-170:4; ¶4, Ex. 3:Crawford Depo., 245:7-14; ¶4, Ex. 5: Piotrowski Depo., 49:9-20, 105:11-24, 107:16-108:6, 164:4-7, 166:2-16, 167:3-8;; ¶ Ex. 19 [filed under seal]; ¶ Ex. :31 [filed under seal].

[17] Epstein Dec.,¶38, Ex. 36 [filed under seal]: Chung Depo., 168:4-15;.

[18] Epstein Dec., ¶3, Ex. 2: Bhatt Depo., 188:3-188:8; ¶ Ex. 32 [filed under seal], Bates No. WM000196.

[19] Epstein Dec., ¶3, Ex. 2: Bhatt Depo., ¶137:22-25, 188:3-8; SAC, Exs. "3" [filed under seal, Docket No. 25-1, p.9], SAC Exs. 5-8 [Docket No. 37]; SAC, Ex. "10" [filed under seal, Docket No. 25-1]; Nikmanesh Dec., ¶16; Anna Nguyen Dec., ¶12; Spentzos Dec., ¶15; Atencio Dec., ¶18; Compendium, ¶7.

[20] Nikmanesh Dec., ¶16; Anna Nguyen Dec., ¶12; Spentzos Dec., ¶15; Atencio Dec., ¶18.

[21] Epstein Dec., ¶13, Ex. 12; Ex. 13 [WM250775: "You are not able to give immunizations at Wal-Mart without APhA training. This is Wal-Mart's policy and standard."]; ¶ Ex. 32 [filed under seal], Bates No. WM000198.

[22] Epstein Dec., ¶5, Ex. 4: Piotrowski Depo., 92:20-94:4; ¶ Ex. 32: [filed under seal], Bates Nos. WM000198-WM000199; Nikmanesh Dec., ¶¶12, 13, Exs. 2 filed with Plaintiffs' Mtn. for Conditional Cert. [Doc. #52-1, p. 14]; Ex. 3 filed with Plaintiffs' Mtn. for Conditional Cert. [Doc. #52-1, p. 16]; Anna Nguyen Dec., ¶9; Spentzos Dec., ¶¶13, 17, Ex. 1 filed with Plaintiffs' Mtn. for Conditional Cert. [Doc. #52-2, pp. 6-9]; Atencio Dec., ¶15; SAC, Ex. 3 [filed under seal, June 15, 2015].

[23] Nikmanesh Dec., ¶14; Anna Nguyen Dec., ¶11; Spentzos Dec., ¶14; Atencio Dec., ¶16; Compendium, ¶12. In calculating the average number of hours, Plaintiffs did not consider an "outlier" who said it took 90 hours.

Training Course during non-working hours.[24] While Wal-Mart paid for the cost of the Training Course itself and paid wages to Pharmacists for their time taking the live classroom portion of the Training Course, Wal-Mart did not pay wages for the time it took Pharmacists to complete the required Home Study portion of the Training Course.[25]

A. The Training Course Was Not Voluntary

The Home Study portion of the Training Course was required in order to successfully complete the Training Course.[26] Being immunization certified and thus taking the Training Course is a minimum job qualification.[27] Even prior to Wal-Mart's decision to make immunization certification a "minimum" job qualification, which was its intention all along, Wal-Mart used threats and pressure to clearly communicate to its Pharmacists that the Training Course was required.[28] Plaintiffs and Training Course Members were threatened with adverse consequences to their work hours and performance reviews if they did not complete the Training Course.[29] During conference calls, Wal-Mart District Managers would apply additional pressure on Plaintiffs and Training Course Class Members to complete the Training Course in order to increase the pharmacy profits for Wal-Mart and would call out those who had not completed the Training Course in front of their peers.[30] Pharmacists who resisted taking the Training Course were dealt with "carefully".[31] Wal-Mart made it clear their intention was to have every store nationwide, including in California, providing immunizations by certified Pharmacists by the end of 2014.[32] Wal-Mart provided to each store standard operating procedures ("SOP") for each pharmacy setting forth in detail the procedures to be followed.[33] Wal-Mart only issues SOP directives for tasks that are mandatory.[34] Wal-Mart's claim that the Training Course was "voluntary" is simply not credible. The message to Pharmacists was received loud and clear: take the Training Course or face consequences. Indeed, Wal-Mart's decision to make immunization certification a preferred qualification in 2014 and then a minimum qualification in 2015 confirms that Wal-Mart always intended to have Pharmacists be certified to administer immunizations to Wal-Mart customers.

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[24] Nikmanesh Dec., ¶15; Anna Nguyen Dec., ¶11; Spentzos Dec., ¶14; Atencio Dec., ¶16; Compendium, ¶ 11.

[25] Epstein Dec., ¶3, Ex. 2: Bhatt Depo., 173:23-174:4; ¶5, Ex. 4: Piotrowski Depo., 92:20-93:23; ¶7, Ex. 6: Moore Depo., 167:24-168:5; ¶9, Ex. 8: Deposition of Scott Voight ("Voight Depo."), 191:20-192:9; ¶ Ex. 24 [under seal]; ¶38 Ex. 36 Chung Depo. [under seal], 150:12-20.

[25] Plaintiffs' Second Amended Complaint ("SAC"), Docket No. 25-1, pp. 42-44.

[26] Epstein Dec., ¶5, Ex. 4: Piotrowski Depo., 92:20-94:4; ¶34 Ex. 32: [under seal], Bates Nos. WM000198-WM000199; Nikmanesh Dec., ¶¶12, 13, Exs. 2 filed with Plaintiffs' Mtn. for Conditional Cert. [Doc. #52-1, p. 14]; Ex. 3 filed with Plaintiffs' Mtn. for Conditional Cert. [Doc. #52-1, p. 16]; Anna Nguyen Dec., ¶9; Spentzos Dec., ¶¶13, 17, Ex. 1 filed with Plaintiffs' Mtn. for Conditional Cert. [Doc. #52-2, pp. 6-9]; Atencio Dec., ¶15; SAC, Ex. 3 [under seal, June 15, 2015].

[27] Epstein Dec., ¶15, Ex. 14: [email praising "selective" hiring practice of hiring only immunization certified Pharmacists]; ¶16, Ex. 15; ¶19, Ex. 17 [under seal]; Nikmanesh Dec., ¶¶16, 17, 23, 26, 27, 29, 30; Anna Nguyen Dec., ¶16; Spentzos Dec., ¶¶16 [told it was not optional], 18, 20; Atencio Dec., ¶¶20 [priority hours will be given to Pharmacists who take Training Course], 21, 23; Compendium, ¶6; Dec. of Michael Denham ("Denham Dec."), Compendium Vol. II, #19, ¶13, Ex. A [told Training Course is mandatory].

[28] Epstein Dec., Ex. 17 [under seal]

[29] Epstein Dec., ; Nikmanesh Dec., ¶29; Spentzos Dec., ¶16; Atencio Dec., ¶20; Compendium, ¶12; Compendium Vol. 2, Denham Dec., Ex. A.

B. The Training Course Is Directly Related To The Pharmacists' Job

The Training Course at issue here was not for the benefit of the employee. Instead, it was for the benefit of Wal-Mart to offer an additional pharmacy services to its customers, fend off competition and increase its revenue.[35] Wal-Mart incorporated into the general job duties of its Pharmacist employees the duty of providing immunization shots to Wal-Mart customers and provided standard operating procedures for the administration of immunizations.[36] In fact, Pharmacists are the only Wal-Mart employees who are permitted to provide immunizations.[37] Wal-Mart requires all of its newly hired Pharmacists to be immunization certified.[38] In calls with Wal-Mart District Managers Pharmacists were given goals and contests to increase the number of immunizations, indicating it was part of their job duties.[39] This evidence establishes that the Training Course is directly related to the job duty of Pharmacists to administer immunizations to Wal-Mart customers. **The Court has already found in its Order Granting Conditional Certification that the Training Course was directly related to the Pharmacists' job and it rejected Wal-Mart's argument that the Training Course was for the benefit of the employee. (Doc. 71, p. 6.)**

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[30] Epstein Dec., ¶21, Ex. 19 [under seal]; Nikmanesh Dec., ¶29; Spentzos Dec., ¶23.
[31] Epstein Dec., ¶19, Ex. 17.
[32] Epstein Dec., ¶25, Ex. 23 [under seal]; ¶34, Ex. 32; Compendium, Vol. II, Denham Dec., 13(d) [Wal-Mart produced 1.5 hour training video stating immunization certification mandatory].
[33] Epstein Dec., ¶29, Ex. 27 [under seal]; ¶33, Ex. 31 [under seal], ¶34, Ex. 32 [under seal].
[34] Nikmanesh Dec., ¶39; Anna Nguyen Dec., ¶15; Spentzos Dec., ¶¶19, 20; Atencio Dec., ¶22.
[35] Epstein Dec., ¶3, Ex. 2: Bhatt Depo., 10:20-12:3, 169:24-170:4; ¶4, Ex. 3: Crawford Depo., 7:13-18245:7-14; ¶5, Ex. 4: Piotrowski Depo., 17:15-20, 49:9-20, 105:11-24, 167:3-8; ¶28, Ex. 26 [under seal]; ¶33, Ex. 31 [under seal]; Compendium, ¶9; Plaintiffs' Cond. Cert, Doc. #52: Nikmanesh Dec., Doc. #52-1, ¶¶21, 24; A. Nguyen Dec., Doc. #52-2, ¶¶13-21, Ex. "1"; Exs. 2, 3 and 4 [under seal]; Atencio Dec., Doc. #52-4, ¶11; Doc. #52-6, Abuelhija Dec., ¶9; Doc. #52-7, Trinh Dec., ¶¶9-10; B. Nguyen Dec., Doc. #52-8, ¶6; K. Nguyen Dec., Doc. #52-9, ¶8.
[36] SAC, Exs. "3" [filed under seal, Docket No. 25-1, p.9], Exs. 6-8; Plaintiffs' Cond. Cert, Doc. #52: Nikmanesh Dec., Doc. #2-1, ¶10, Ex. "5", ¶¶11, 13, Ex. "7" and "8"; A. Nguyen Dec., Doc. #52-2, ¶18; Atencio Dec., Doc. #52-4, ¶11; Denham Dec., Doc. #52-5, ¶8; Doc. #52-4, Abuelhija Dec., Doc. #52-6, ¶8; Doc. #52-8, B. Nguyen Dec., ¶6; Doc. #52-9, K. Nguyen Dec., ¶8.

III. Wal-Mart Failed to Make Available Mandated Rest Breaks

Wal-Mart maintains "on paper" a common written rest break policy applicable to all non-exempt employees in California, including Pharmacists.[40] This rest break policy, "on its face", provides that employees are to receive a 15 minute, uninterrupted rest break for every 3 hours worked.[41] Conditions placed by Wal-Mart on rest breaks are as follows: (1) rest breaks may not be attached or combined with a meal period or other rest break; (2) rest breaks may not be taken at the beginning or end of shifts, and; (3) rest breaks should be scheduled in the middle of each three hour period worked.[42] While Wal-Mart's policies make clear that failure to take a rest break may result in disciplinary action, including termination, Wal-Mart's common policies do not provide for premium pay for missed rest breaks as required by California law.[43] *Saechao v. Landry's, Inc.,* 2016 WL 1029479 *5-6 (N.D.Cal., Mar. 15, 2016).

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[37] Epstein Dec., ¶3, Ex. 2: Bhatt Depo., 188:3-188:8; ¶ Ex. 32 [filed under seal], Bates No. WM000196.
[38] Epstein Dec., ¶3, Ex. 2: Bhatt Depo 157: 8-21; ¶44, Ex. 42.
[39] Epstein Dec., ¶20, Ex. 18 [under seal]; ¶21, Ex. 19 [under seal]; Cond. Cert, Doc. #52: Nikmanesh Dec., Doc. #52-1, ¶24, Ex. 10 [filed under seal]; A. Nguyen Dec., Doc. #52-2, ¶16, Ex. "2" [filed under seal], ¶18, Ex. "3" [filed under seal], ¶¶19-20, Ex. "4" [filed under seal], ¶20.
[40] Epstein Dec., ¶44, Ex. 42: P001667-P001668.
[41] *Id.*
[42] *Id.* [Timing of rest breaks].
[43] *Id.*

While the rest break policy appears to be lawful, in reality, Wal-Mart imposes on its Pharmacists a series of policies and practices that act as a barrier preventing and discouraging Plaintiffs and Rest Break Class Members from being able to take most, if not all, of their rest breaks. These common policies, applicable to all Pharmacist employees include Wal-Mart's Pharmacy security policies, staffing policies, and prescription quotas.

A. Wal-Mart Prohibits the Pharmacy to Be Left Unattended by a Pharmacist Without First Securing the Pharmacy

Wal-Mart has a policy which emphasizes pharmacy security called "POM 902".[44] Security protocols in said policy make clear that the Pharmacist on duty is responsible for the security of the pharmacy at all times, even during breaks.[45] Wal-Mart had a strict policy that a Pharmacist could not leave the pharmacy unattended without securing the Pharmacy and violation of this policy is grounds for termination.[46] This policy of prohibiting the pharmacy from being left unattended by a Pharmacist applies even during rest and meal breaks, in order to prevent unauthorized access to prescription medications and prevent diversion (theft).[47] Wal-Mart's policy specifically prohibits: "…leaving the pharmacy unsecured when no Pharmacist is present including at lunch, during breaks, or after business hours."[48] If a Pharmacist leaves the pharmacy unattended (by a Pharmacist), the Pharmacist is required to, inter alia, tell customers in line the Pharmacy is closing, relocate the Will Call Bin to the inside of the prescription filling area, instruct non-Pharmacist employees to exit, shut down the computer system, secure all drugs, put the phone on voicemail, close and lock all pharmacy windows and doors, and set the alarm.[49] This process can take 10-15 minutes to close down the pharmacy and another 5-10 minutes to re-open the pharmacy.[50] While Pharmacists were permitted to close down the pharmacy for 30 minute meal periods and were even provided a sign to notify customers of their absence, Pharmacists' managers actively discouraged Plaintiffs and Rest Break Class Members from closing the pharmacy for rest breaks.[51] Wal-Mart offered to permit Pharmacists to take their rest breaks within the pharmacy, but that was impossible to do without being interrupted with work duties. Any rest break inside the Pharmacy could not be an uninterrupted rest break because the Pharmacist was still required to watch the pharmacy to prevent drug theft and control access.[52]

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[44] "POM" stands for "Pharmacy Operations Manual": Epstein Dec., ¶35, Ex. 33 [under seal]: WM000009-16 [POM 902]; ¶7, Ex. 6: Moore Depo., 107:3-21; ¶45, Ex. 43: Deposition of Alfred Rodriguez (PMK), 20:10-20:19.

[45] Epstein Dec., ¶35, Ex. 33 [under seal]: WM000009.

[46] Epstein Dec., ¶32, Ex. 30 [under seal]: WM000017; Compendium, ¶14.

[47] Epstein Dec., ¶35, Ex. 33[under seal]: P000010, P000778; ¶22, Ex. 20 [under seal]: WM207421-207422 ¶31, Ex. 29 [under seal]: WM200134-200136; Nikmanesh Dec., ¶5(f); Anna Nguyen Dec., ¶5(g); Spentzos Dec., ¶4(g); Atencio Dec., ¶7(G).

[48] Epstein Dec., ¶35, Ex. 33 [under seal]: POM902: WM000017.

Wal-Mart also discouraged and impeded Pharmacists from shutting down the pharmacy for rest breaks so that customer service would not be interrupted. In response to a complaint from Plaintiff Spentzos, the Senior Director of the Health and Wellness Division, Warren Moore, who had overall responsibility for all the Pharmacies in the Western portion of the United States, made clear there was an effort by Wal-Mart to "…minimize the number of times (if any) we close the pharmacy throughout the day."[53] The concern was disrupting the flow and service of customers which could lead to a loss of business and could negatively impact Market Director performance reviews.[54] Other Pharmacists report the same active discouragement by Wal-Mart management which resulted in Pharmacists being

[49] Epstein Dec., ¶31, Ex. 29 [under seal]; ¶35, Ex. 33 [under seal]; ¶43, Ex. 41 [under seal]: Patel Depo., 67:5-18; Spentzos Dec., ¶4(a).
[50] Nikmanesh Dec., ¶5(a); Anna Nguyen Dec., ¶5(a); Spentzos Dec., ¶4(a); Atencio Dec., ¶7(A); Compendium, ¶15.
[51] Epstein Dec., ¶10, Ex. 9:[P001773]; ¶11, Ex. 10: WM214348; ¶46, Ex. 44: P001777; ¶48, Ex. 46:WM205532-205533; Spentzos Dec., ¶4(f); Compendium, ¶20; Compendium, Vol. II: #14: Conde Dec., ¶7, 8 [told by manager rest breaks just don't happen]; Vol. II, #18, J. Dang Dec., ¶7 [disciplinary action after leaving pharmacy for 4 minutes to get a drink]; Vol. III, #30: R. Le Dec., ¶4(a) [management frowns on closing pharmacy for rest breaks]; Vol. V, #54: Surh Dec., ¶8 [told could not take rest breaks].
[52] Nikmanesh Dec., ¶5(f); Anna Nguyen Dec., ¶5(g); Spentzos Dec., ¶4(g); Atencio Dec., ¶7(G); Compendium, ¶22.
[53] Epstein Dec., ¶11, Ex. 10:: WM214348; ¶36, Ex. 34 [under seal]: Moore Depo., 138:13-19.
[54] Epstein Dec., ¶6, Ex. 5: Patel Depo., 33:22-35:9; ¶10, Ex. 9:[P001773]; ¶11, Ex. 10:P001378; ; ¶12, Ex. 11: WM205532-33.¶23, Ex. 21 [under seal]: WM207699-207700

forced to forego their rest breaks when they were the only Pharmacist present.[55] This is only one of Wal-Mart's policies that contradicts its written rest break policy and prevented or discouraged Pharmacists from taking rest breaks.

B. Wal-Mart Frequently Scheduled Only One Pharmacist For Significant Periods of the Workday and On Weekends Which Prevented that Pharmacist from Taking Rest Breaks

Wal-Mart's scheduling of Pharmacists resulted in only one Pharmacist working the entire day on the weekends, only one Pharmacist working the entire day on weekdays in those Pharmacies which were not considered "busy enough" to warrant two Pharmacists being scheduled, and working alone for much of their shift on the weekdays even in those Pharmacies where two Pharmacists were scheduled.[56] When only one Pharmacist was working it meant there was no one to relieve them for rest breaks.[57] Wal-Mart staggered the shifts of Pharmacists on the weekdays in those Pharmacies where two Pharmacists were scheduled. During the first 3 ½ to 4 hours of the day, there would be only one Pharmacist on duty.[58] When only one Pharmacist was on duty he/she was prevented from taking a rest break because Wal-Mart required them to shut down the pharmacy completely if they wanted to leave the Pharmacy to take a rest break and also required them to minimize the number of times (if any) the pharmacy was closed to prevent disruption in customer service.[59] Even when the shifts were staggered, the Pharmacist would be prevented from taking their first rest break because the other Pharmacist came on duty just before the required meal break and Pharmacists were prevented from combining meal and rest breaks.[60]

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[55] Nikmanesh Dec., ¶¶7, 9; Atencio Dec., ¶13; Conde Dec., ¶7, 8; J. Dang Dec., ¶7; R. Le Dec., ¶4(a); Braverman Dec., ¶9; J. Dang Dec., ¶7; Hong Dec., ¶8 [emails]; B. Nguyen Dec., ¶13; K. Nguyen Dec., ¶15; P. Nguyen Dec., ¶15; Surh Dec., ¶8; Surh Dec., ¶8.

[56] Compendium, ¶17; Nikmanesh Dec., ¶5(c); Anna Nguyen Dec., ¶5(b); Spentzos Dec., ¶4(c); Epstein Dec., ¶12, Ex. 11: Voigt Depo 86: 6-18.

[57] Nikmanesh Dec., ¶5(c); Anna Nguyen Dec., ¶5(b); Spentzos Dec., ¶4(c); Compendium, ¶17.

[58] *Id.*

[59] See Footnotes 49, 52, 56 and 57 above.

[60] *Id.*; Epstein Dec., ¶44, Ex. 42:P001667-1670 [Wal-Mart rest break policy]; Nikmanesh Dec., ¶5(c); Anna Nguyen Dec., ¶5(b); Spentzos Dec., ¶4(c); Compendium, ¶17..

This staffing policy, along with the requirements that Pharmacists not leave the pharmacy unattended, minimize the closing of the pharmacy throughout the day, and the requirement that it is the Pharmacist's responsibility to monitor the Pharmacy to prevent drug theft and control access (which precluded a rest break inside the Pharmacy uninterrupted by work) all combined to prevent or discourage Pharmacists from taking rest breaks.

C. Wal-Mart's Performance Evaluation of Pharmacists, Quotas and Prescription Fill Time Requirements

In addition to the above policies, Wal-Mart imposed minimum performance criteria upon which Pharmacists and Market Directors (supervisors) are evaluated.[61] One criterion is that in-store prescriptions (those not called in by a physician) had to be filled within 20 minutes.[62] Wal-Mart has the ability to track when the prescription is received and when it is filled.[63] Wal-Mart also solicits customer surveys and the responses are used in the performance evaluation of Pharmacists and other Wal-Mart employees.[64] A Pharmacist must be present in order to check out a prescription.[65] If pharmacy customers are kept waiting to fill or check out prescriptions while a Pharmacist is on a rest break, the Pharmacist risks a poor performance review which could jeopardize their job and negatively impact their pay and career at Wal-Mart.[66] The negative impact was also felt by the Market Directors who would turn up the pressure even more on the Pharmacists to perform.[67]

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[61] Nikmanesh Dec., ¶5(d), 5(e); Anna Nguyen Dec., ¶5(f); Spentzos Dec., ¶4(d), 4(e); Compendium, ¶¶18, 19, 21.

[62] Nikmanesh Dec., ¶5(b); Anna Nguyen Dec., ¶5(d); Spentzos Dec., ¶4(b), 4(c)(i); Atencio Dec., ¶7(C); Compendium, ¶¶16, 18.

[63] Epstein Dec., ¶18, Ex. 16, p. 9 [under seal];¶38, Ex. 36 [filed under seal]: Chung Depo., 90:20-92:25; Nikmanesh Dec., ¶5(b); Anna Nguyen Dec., ¶5(d); Spentzos Dec., ¶¶4(b), 4(c)(i); Atencio Dec., ¶7(C); Compendium, ¶.

[64] Epstein Dec., ¶3, Ex. 2, ¶42, Ex. 40 [Under Seal]. Bhatt Depo., 16:16-19; ¶43, Ex. 41: Patel Depo. [under seal], 54:1-15; ¶28, Ex. 26 [under seal], WM200987. Rodriguez Depo. 38:8-39:21, 47:2-48:19.

[65] Epstein Dec., ¶35, Ex. 33: POM 902, WM000009.

[66] See Footnote 57 above.

[67] Epstein Dec., ¶27, Ex. 25 [under seal]: WM213923-213927; ¶28, Ex. 26 [under seal]: WM200987; Ex. :WM00096-97.

D. Plaintiffs and Putative Class Members Were Not Able to Take Rest Breaks

Plaintiffs have submitted declarations from putative class members representing 88 of an estimated 310 Wal-Mart Stores in California.[68] Plaintiffs and Rest Break Class Members submit testimony that the above-referenced Wal-Mart policies prevented and discouraged their ability to take rest breaks, which resulted in Plaintiffs and the Rest Break Class Members missing most, if not virtually all of their rest breaks.[69] Plaintiffs and Rest Break Class Members were prevented from taking their rest breaks inside the pharmacy because Wal-Mart required the Pharmacists to monitor the Pharmacy all at times the Pharmacy was open in order to prevent drug diversion and control access to the Pharmacy.[70] This makes any "rest break" inside the Pharmacy an "on duty" rest break which is non-compliant since it is not uninterrupted by work.

IV. Standards for Certification Under Rule 23(a)

A class must satisfy four prerequisites under Federal Rule of Civil Procedure 23(a): (1) numerosity of parties; (2) questions of law or fact common to the class; (3) the named parties' claims are typical of the class; and (4) the class representatives can adequately protect the interests of the class. *Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998).

In addition to the four Rule 23(a) requirements, Plaintiff must also satisfy one of three subsections under Rule 23(b)(3). Plaintiffs seeks to certify a class under Rule 23(b)(3) which requires the court find questions of law or fact common to the class predominate over individual issues and that a class action is superior to other available methods for adjudicating the matter. Fed.R.Civ.P. 23(b)(3).

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[68] Epstein Dec., ¶2, Ex. 1; Nikmanesh Dec., ¶3; Anna Nguyen Dec., ¶3; Spentzos Dec., ¶2; Atencio Dec., ¶¶2-4; Compendium, ¶24

[69] Nikmanesh Dec., ¶6; Spentzos Dec., ¶5; Atencio Dec., ¶¶7(D), 8; Compendium, ¶23.

[70] "POM" stands for "Pharmacy Operations Manual": Epstein Dec., ¶7, Ex. 6: Moore Depo., 107:3-21; ¶31, Ex. 29 [Under Seal]; ¶35, Ex. 33 [under seal]; WM000009-16 [POM 902]; ¶45, Ex. 43: Deposition of Alfred Rodriguez (PMK), 20:10-20:19; Nikmanesh Dec., ¶5(f); Anna Nguyen Dec., ¶5(g); Spentzos Dec., ¶4(g); Atencio Dec., ¶7(G); Compendium, ¶22.

A. Numerosity

Rule 23(a)(1) requires a class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). In making a determination of whether a class is sufficiently numerous to support certification, the Court may consider reasonable inferences drawn from the facts before it. *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 589-90 (N.D.Cal., May 26, 2015). Even a class containing as little as 40 potential class members satisfies numerosity. *Avilez v. B Gov't Servs.,* 286 F.R.D. 450, 456 (C.D.Cal.2012).

Pursuant to discovery in this matter, Plaintiffs have obtained a list of 1,251 current and former non-exempt Pharmacist employees of Wal-Mart who worked in California during the relevant period identified from Wal-Mart's records.[71] Furthermore, approximately 100 Pharmacists employed by Wal-Mart in California opted in to the FLSA Class and are eligible Training Course Class Members, approximately 40 Putative Training Course Class members have submitted Declarations that they have taken the Training Course, and Scott Voigt the Regional Manager for Small Markets in Southern California, with responsibility for approximately 123 stores and 300 Pharmacists, testified that only 12 or less Pharmacists are not immunization certified.[72] (Of course these 12 Pharmacists will have to become immunization certified or they will be terminated since certification is a minimum qualification.) Extrapolating out the 40 Declarants who have taken the Training Course out of 66 Declarants to the entire putative Training Course Class, would result in approximately 763 putative Training Course Class Members having taken the Training Course.

B. Commonality Is Met

"A class has sufficient commonality 'if there are questions of law and fact which are common to the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1101, 1019

[71] Epstein Dec., ¶12, , Ex. 11.

[72] Epstein Dec., ¶9, Ex. 8: Voigt Depo 197: 14-22; ¶40, Ex. 38: Voigt Depo. [under seal], 198: 5-199: 16.

(9th Cir.1998) (quoting Fed.R.Civ.P. 23(a)(2)). "All questions of fact and law need not be common to satisfy this rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* *See also Hamidi v. SEIU Local 1000*, No. 2:14-319 WBS KJN, 2015 U.S. Dist. LEXIS 67419, at *8 (E.D. Cal. May 22, 2015).

Here, there are common questions of law and fact as to both classes:

1. **Training Course Class:** Common questions of fact and law that apply to the Training Course Class are: (i) whether Wal-Mart was required to pay minimum wage and/or overtime wages to Plaintiff and putative class members for the Home Study portion of the Training Course. Wal-Mart contends it did not require Pharmacists to become immunization certified and therefore their attendance at the Training Course was voluntary. Whether or not attendance at the Training Course was voluntary is a common question that can be determined on a class-wide basis.

Moreover, even if the Training Course was voluntary (which it was not) it is still compensable if it is directly related to the Class Members' jobs as Pharmacists. It is thus a common question of whether taking the Training Course to become immunization certified is directly related to the Pharmacists' job.[73]

2. **Rest Periods:** Common questions applicable to the Rest Break Class include: (i) whether Wal-Mart's competing policies discouraged and/or prevented Rest Break Class Members from taking rest breaks; and (ii) whether or not a rest break must be duty free. **That common issue is now pending before the California Supreme Court.** In *Augustus*, *supra*, the lower court granted certification to a class of security guard employees who were required to be "on-

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[73] Immunization certification is now a minimum qualification for the job, which establishes that the Training Course is directly related to the Pharmacists' job. Epstein Dec., ¶3, Ex. 2: Bhatt Depo 157: 8-21. *See also* Court Order Granting Conditional Certification, Doc. 71, p. 6.

call" during their rest breaks. The Appellate Court reversed the lower court's certification order finding that "on call" rest breaks are permissible. *Id.* at 1082.[74] Wal-Mart is likely to argue that if it required a Pharmacist to remain in the pharmacy for rest breaks, it does not constitute a rest break violation, even though the Pharmacist is "on duty", not just "on call". The *Augustus* case will resolve that

3. common issue because if it finds that "on call" rest breaks constitute a rest break violation, then certainly "on duty" rest breaks will also constitute a violation.

C. Typicality is Fulfilled

Typicality is met where the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. Fed.R.Civ.P. 23(a)(3). Typicality is found where the named plaintiffs allege they have suffered the same injury arising from the same conduct by defendant. *Joint Equity Comm. Of Invest. Of Real Estate Partners, Inc. v. Coldwell Banker Real Estate Corp. ("Joint Equity"),* 281 F.R.D. 422, 427 (C.D.Cal. Mar. 26, 2012). Here, the same conduct and theories are asserted by Plaintiffs on behalf of themselves and the putative class: (i) that Wal-Mart failed to pay them for compensable time spent on the Home Study portion of the Training Course, and; (ii) that Wal-Mart failed to make available to them uninterrupted rest breaks in violation of the California law.

D. Adequacy

Legal adequacy exists if (i) the named plaintiffs and their counsel have no conflicts of interest with the class, and (ii) the named plaintiffs and their counsel will vigorously prosecute the action on behalf of the class. *Boyd v. Bank of America Corp.*, 300 F.R.D. 431, 438 (C.D.Cal. June 27, 2014).

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[74] Plaintiffs do not cite to this case as legal authority, but only to demonstrate to the Court a common legal issue in this case will soon be resolved by the California Supreme Court.

In this case, Plaintiffs have "demonstrated a willingness and vigor to prosecute the action." *In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 156 (N.D.Cal. 1991). Plaintiffs have been actively involved in the litigation assisting counsel in responding to discovery, submitting to depositions, obtaining documents, assisting counsel with class and conditional certification and have shown through their declarations a keen understanding of the issues.

There is no doubt Plaintiffs and counsel have vigorously prosecuted the action. After opposing two motions to dismiss brought by Wal-Mart, Plaintiffs successfully moved for conditional certification of the FLSA class. (Docket Nos. 52 (Plaintiffs' Motion), 71 (Order)). Plaintiffs and their counsel have diligently propounded written discovery, taken and defended numerous depositions in 4 states, and combed through hundreds of thousands of pages of documents produced by Wal-Mart.[75]

Although Plaintiff Nikmanesh has alleged an individual claim for wrongful termination, she has demonstrated she will pursue vigorously the interests of the class and has no conflict. Courts routinely allow named plaintiffs to simultaneously pursue individual and class claims. *See, e.g., Saucedo v. NW Mgmt. & Realty Servs*., 290 F.R.D. 671, 683 (E.D. Wash. 2013); *Benedict v. Hewlett-Packard Co.*, __F.R.D.___, 2016 WL 1691893 *13 (N.D.Cal., April 8, 2016).

Plaintiffs' counsel have extensive experience in employment law, have served as class counsel in many wage and hour class actions,[76] and have been appointed by this Court as Class Counsel for the Conditionally Certified FLSA Class. Plaintiffs' counsel's only relationship with the named representatives is that of attorney-client. Therefore, counsel is adequate. *Pace v. PetSmart, Inc.*, 2014 WL 2511297 *8 (C.D.Cal., June 3, 2014).

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[75] Epstein Dec., ¶49.
[76] *See* Epstein Dec., ¶¶ 51-71;

V. Plaintiffs Satisfy the Rule 23(b) Requirements

A. Predominance: Common Questions Predominate Over Individual Issues

The predominance inquiry "focuses on the relationship between the common and individual issues." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir.2001). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, *supra*, 150 F.3d at 1022. To establish predominance of common issues, a party seeking class certification is not required to show that the legal and factual issues raised by the claims of each class member are identical. Rather, the predominance inquiry focuses on whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Local Jt. Exec. Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands*, 244 F.3d 1152, 1162 (9th Cir.2001)(quoting *Amchem*, 21 U.S. at 623

). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than individual basis." *Hanlon, supra* 150 F.3d at 1022. Proof plaintiffs will prevail on the merits is not required as a prerequisite to class certification, only a showing that questions common to the class predominate, not that the questions will be answered in favor of plaintiffs. *Amgen, Inc. v. Conn. Ret. Plans and Trust,* 133 S.Ct. 1184, 1191 (2013). Although the certification analysis may require some overlap with the merits, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id.* at 1195.

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1. Plaintiffs and Training Course Class Members Are Victims of a Common Practice Such That Common Issues Predominate

Plaintiffs allege Wal-Mart failed to pay Training Course Class Members minimum wage and overtime compensation for time spent on the Home Study portion of the Training Course.[77] Whether or not this time is "compensable" is an issue common to all Training Course Class Members. Under federal law, time spent attending employer-sponsored training programs are generally considered compensable. *Seever v. Carrols Corp.*, 528 F.Supp.2d 159, 167 (W.D.N.Y.2007), citing *Chao v. Tradesmen Int'l, Inc.*, 310 F.3d 904, 907 (6th Cir.2002). California utilizes the standards announced by the U.S. Department of Labor contained in 29 C.F.R. §§785.27-785.31 with regard to training programs for employees.[78]

Here, it is undisputed Plaintiffs and Training Course Class Members received no compensation for time spent on the Home Study portion of the Training Course.[79] It is undisputed that the Home Study portion of the Training Course was required to successfully complete the Training Course.[80] Notwithstanding the general rule establishing such time is compensable, Wal-Mart will likely rely on an exception to the payment of time spent in training courses set forth in 29 C.F.R. §785.27.[81]

29 C.F.R. §785.27 provides:

"Attendance at lectures, meetings, training programs and similar activities *need not be counted as working time* if the following four criteria are met:

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[77] Plaintiffs' Second Amended Complaint ("SAC"), Docket No. 25, ¶20, 6:17-18.

[78] Epstein Dec., ¶48, Ex. 46; Relevant excerpt from the California Division of Labor Standards Enforcement Manual ("DLSE Manual"); *see also See's Candy Shop, Inc.,* 218 Cal.App.4th 889, 903; *Alonzo v. Maximus, Inc.*,832 F.Supp.2d 1122, 1126 (C.D.Cal., 2011) [federal standards have been expressly adopted by the DLSE and the adoption of the federal standard is consistent with the practice of California courts to look to federal law for guidance in interpreting California law].

[79] Epstein Dec., ¶3, Ex. 2: Bhatt Depo., 173:23-174:4; ¶5, Ex. 4: Piotrowski Depo., 92:20-93:23; ¶26; ¶9, Ex. 8: Voight Depo., 191:20-25; Ex. 24 [under seal]: WM203886-203887; ; ¶38, Ex. 36 [under seal]: Chung Depo., 150:12-20;.

[80] Epstein Dec., Nikmanesh Dec. in Support of Pltfs. Mtn. for Cond. Certification, Ex. 1 [filed under seal: Doc.# 49]; Nikmanesh Dec. in Support of Pltfs. Mtn. for Cond. Cert., Ex. 2 [Doc.# 52-1]; Dec. of Effie Spentzos in Support of Pltfs. Mtn. for Cond. Cert., Ex. 1 [Doc.#52-3].

[81] Defendant's Opp. To Pltfs. Mtn. for Cond. Cert., Doc. #59, p. 21.

(a) Attendance is outside of the employee's regular working hours;
(b) Attendance is in fact voluntary;
(c) The course, lecture, or meeting is not directly related to the employee's job; and
(d) The employee does not perform any productive work during such attendance." [emphasis added]29 C.F.R. §785.27 provides an *exception* to the employer's obligation to compensate employees for time spent in training under very limited circumstances. If any one of the four criteria set forth in 29 CFR §785.27 is **not** met, the employer **must** pay for training time. *Haszard v. Amer. Med. Response Northwest, Inc.*, 247 F.Supp.2d 1151, 1160 (D.Ore. 2001).

a. The Training Course Was Not Voluntary:

Participation in training is not voluntary and thereby required by the employer "…if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance." *Wilson v. Cty of Santa Clara*, 68 Cal.App.3d 78, 83 (1977), citing 29 CFR §785.28; *see also Haszard, supra* at 1153; *Seever, supra* at 167.

As set forth in Section II above, Wal-Mart's actions in rolling out the immunization certification program made clear to Plaintiffs and Training Course Class Members that completion of the Training Course was not "voluntary".

b. The Training Course Is Directly Related to The Pharmacists' Job:

Whether or not ultimately it is found that the Training Course is "directly related" to the Plaintiffs' and Training Course Class Members' job is a merits question for the finder of fact. *Wicke v. L&C Insulation, Inc.*, 2014 WL 2957434 * 9 (W.D.Wis.2014); *Allen v. City of Texas City*, 2012 WL 1316568 * 4 (S.D.Tex.2012). If the course relates to the current job duties or expectations and is not designed to prepare the employee for advancement or promotion, it is "directly related" to the employee's job. *Seever, supra* at 1552.

In this case, it is clear that administering immunizations is directly related to the Pharmacists' job. (*See* discussion at II.B. *infra*.) Also, this Court has already held in granting conditional certification of the FLSA Class that administering immunizations is directly related to the Pharmacists' job. (Doc. 71, p. 6.) The resolution of the common question of law and fact as to whether the time Plaintiffs and putative class members spent on Home Study portion of the Training Course is compensable (including whether the exception to 29 C.F.R. §785.27 applies) is a common issue that can be resolved as to Plaintiffs and all putative class members.

2. Wal-Mart's Common Policies and Practices Discouraged and/or Prevented Plaintiffs and Rest Break Class Members from Taking Uninterrupted Rest Breaks

The common questions applicable to the Rest Break Class are: (1) Did Wal-Mart's policies as set forth above, that were inconsistent with its written rest break policy, prevent and/or discourage Pharmacists from taking rest breaks; (2) did Pharmacists actually miss rest breaks; and (3) did Wal-Mart pay an extra hour of pay to Rest Break Class Members who were unable to take rest breaks.

Employees must receive a minimum of one ten-minute rest break for each four-hour work period, or major fraction thereof. Industrial Welfare Commission Wage Order 4-2001 at par. 11-12. "Every employer shall authorize and permit all employees to take rest breaks, which insofar as practicable shall be in the middle of each work period…" (Cal. Code Regs. Section 11040, subd. 12(A).) There is no "on duty" exception for mandatory ten-minute rest breaks. Further, an employer may not count cumulative "down time" as bonafide rest breaks. *Bufil v Dollar Financial*, 162 Cal.App.4th 1193, 1198.

An employer satisfies its rest break obligation if it relieves its employees of all duty, relinquishes control over their activities and does not impede or discourage them from taking breaks. *Brinker v. The Superior Court of San Diego County* (2008) 53 Cal 4th 1004; See also *Campbell v. Vitran Exp., Inc.*, 2015 WL 7176110 *2, 9 (C.D.Cal., Nov. 12, 2015)(Slip Copy) certifying rest break class based on "unofficial" policy class members were discouraged from taking rest breaks based on declarations of 13 class members]. This "policy-to-violate-the-policy" theory is one recognized as being appropriate for certification by the Ninth Circuit. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1166 (9th Cir.2014), cert. denied, 135 S.Ct. 2835 (2015).

Plaintiffs have established above that several Wal-Mart polices placed on Pharmacist employees, including but not limited to, that the Pharmacist could not leave the Pharmacy unattended without shutting it down, that Pharmacists were required to monitor the Pharmacy while inside the Pharmacy, at all times the Pharmacy was open to prevent drug theft and control access, and the evaluation of Pharmacists' job performance based on customer service surveys and ability to fill prescriptions within 20 minutes, all resulted in common practices that discouraged and/or prevented Rest Break Class Members from taking rest breaks.

B. Superiority

In determining if a class action is superior, the Court considers: (1) class members' interest in individually controlling the litigation, (2) the extent of any litigation involving class members and the current controversy, (3) the effect of litigating all the claims in this forum; and (4) the difficulty managing the case as a class action. *Joint Equity, supra* 281 F.R.D. at 436, citing Fed.R.Civ.P. 23(b)(3).

Here, Plaintiffs are informed and believe that no other litigation has been commenced by a class member against Wal-Mart asserting the same violations during the relevant time period.[82] Further indication that Class Members have no inclination or desire to pursue these claims individually is based on the fact that Plaintiffs have secured declarations from 66 class members (including plaintiffs) representing at least 88 locations or approximately 28% of all Wal-Mart California locations.[83] In addition, approximately 416 individuals filed Consents to Join the

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[82] Epstein Dec., ¶50.

[83] Epstein Dec., ¶2, Ex. 1: Wal-Mart annual report excerpts: P001910-1912; Nikmanesh Dec., ¶3; Anna Nguyen Dec., ¶3; Spentzos Dec., ¶2; Atencio Dec., ¶¶2-4; Compendium, ¶24.

FLSA collective action.[84]

Pursuit of these claims in this forum is appropriate because the Rule 23 class involves Pharmacists who worked for Wal-Mart in California, California labor laws are at issue and representative plaintiffs Nikmanesh and Nguyen worked for Wal-Mart in several locations in Orange County, California.[85]

Finally, the case is manageable as common questions relating to Wal-Mart's competing policies that contradict its rest break policy will establish liability as to all class members. *Campbell, supra* at *10. [Certifying rest break class based on "unofficial" policy class members were discouraged from taking rest breaks].

1. Damages Can Be Proven on a Class-Wide Basis

Although not required to submit proof of a class-wide damage methodology at the certification stage, nonetheless Plaintiffs have submitted the Declaration of Malcolm S. Cohen, Ph.D. that sets forth a plan to obtain information from class members for presentation on damages.[86] *Hatamian v. Advanced Micro Dev., Inc.*, 2016 WL 1042502 *8 (N.D.Cal., Mar. 16, 2016) (Slip Copy) [rejecting defendant's argument that pursuant to *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013) plaintiffs were required to prove a class-wide damage methodology to demonstrate predominance). For the most part, Wal-Mart's own documents can be used to identify which Pharmacists attended the Training Course during the Class Period[87], what hours each Training Class Member worked during the time they completed the Home Study portion of the Training Class, when a Pharmacist was the sole Pharmacist scheduled to work, alarm records indicating whether the pharmacy was closed to take a rest break and payroll records to extract the rates of pay for purposes of calculating damages. (Cohen Dec., ¶9). Surveys can then be used to gather information directly from Class Members for both classes. With respect to the Training Course Class a survey can be conducted to determine the time each Training Course Class Member spent on the Home Study portion of the Training Class. (Cohen Dec., ¶12) That information can then be compared with each Training Class Members' scheduled work hours and pay records to determine whether overtime and/or minimum wage pay is due. (Cohen Dec., ¶¶9, 12) Payroll records can then be used to determine the applicable rates of pay. (Cohen Dec., ¶9.)

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[84] Docket Nos. 74-78, 80-82. It should be noted that Plaintiffs have agreed to dismiss 162 opt-ins as they are not eligible FLSA Class Members either because they did not work overtime in the week they took the Home Study portion of the Training Course, or they did not take the Training Course during their employment with Wal-Mart during the relevant time period or for other reasons which makes the ineligible.

[85] Nikmanesh Dec., ¶3; Anna Nguyen Dec., ¶3.

[86] Declaration of Malcolm S. Cohen, Ph.D. ("Cohen Dec.") filed concurrently herewith.

[87] These documents may also be obtained from the Training Course provider.

For the Rest Break Class, a survey can be used to determine the number of rest breaks missed per week and the reasons they were missed. (Cohen Dec., ¶11). This information can then be compared with alarm records and work schedules to determine whether each Rest Break Class Member closed the pharmacy for a rest break and with pay records to determine whether the Class Member was provided with premium pay. (Cohen Dec., ¶¶9, 11). Dr. Cohen sets forth the methodology for how the survey will be administered, how the survey population is determined and how the results will be analyzed. (Cohen Dec., ¶¶13-26.) Dr. Cohen projects a confidence level of 95% and a margin of error of less than 10%. (Cohen Dec., ¶¶17-20.)

VI. Conclusion

Plaintiffs satisfy Rule 23's requirements. Plaintiffs respectfully request the Court enter the Proposed Order submitted concurrently herewith.

Dated: June 1, 2016

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